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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-139163-004 DT 05/11/2012

HON. KAREN L. O'CONNOR

CLERK OF THE COURT
C. Smith
Deputy

STATE OF ARIZONA

BURT A JORGENSEN
MICHAEL G GINGOLD

v.

DANIEL ENRIQUE GARCIA-SAENZ (004)

STEPHEN L DUNCAN
KENNETH S COUNTRYMAN

CAPITAL CASE MANAGER

RULING

On May 4, 2012, the Court heard argument on Defendant's Motion to Strike the (F)(2) and (F)(5) Aggravating Factors-Multiplicity; and Defendant's Motion to Sever Count 5 of the Indictment. At the conclusion of the hearing, the Court took the matters under advisement. The Court has considered the Motions, Responses, Replies, and the parties' respective arguments.

Defendant's Motion to Dismiss the Aggravating Factors Alleged Under A.R.S. § 13-751(F)(2) and (F)(5)

Defendant is charged, *inter alia*, with first-degree felony murder (Count 1), burglary in the first degree (Count 2), and attempted armed robbery (Count 3). Count 2 and Count 3 are the basis for the felony murder count. Pursuant to A.R.S. § §13-751(F), the State has alleged the aggravating circumstances of (F)(2) and (F)(5).

Defendant moves to dismiss the (F)(2) aggravator relating to the first degree burglary and attempted armed robbery charges on the grounds that offenses may not be used both as the predicate felony to the felony murder charge and as an aggravator because it allows for multiple punishments for the same offense and therefore violates double jeopardy. Further, Defendant

argues that the (F)(2) factor does not sufficiently narrow the class of death eligible defendants thereby violating the Eighth Amendment.

Charges are multiplicitous if they charge a single offense in multiple counts. *Merlina v. Jejna*, 208 Ariz. 1, 4, 90 P.3d 202 (App. 2004), review denied. Here, the (F)(2) aggravator is not that the murder was committed during the course of the predicate felony, but rather, that the defendant also committed a serious offense. The offense of felony murder does not require that the defendant have been charged with and convicted of the underlying predicate felony. *State v. Lacy*, 187 Ariz. 340, 350, 929 P.2d 1288, 1298 (1996)("The jury must simply find that the defendant committed or attempted to commit it."); *State v. Johnson*, 215 Ariz. 28, 156 P.3d 445 (App. 2007). Therefore, he is not automatically eligible for the death penalty. Using the contemporaneous convictions of Counts 2 and 3 as an (F)(2) aggravator that makes the defendant death eligible does not subject him to multiple punishment and therefore does not violate the Double Jeopardy Clause. *See State v. Pandeli*, 215 Ariz. 514, 161 P.3d 557 (2007) (using prior conviction as (F)(2) aggravator does not violate double jeopardy); *State v. Morris*, 215 Ariz. 324, 160 Ariz. 203 (2007) (Morris's multiple murder convictions from the guilt phase were properly used as (F)(2) aggravator). Further, the Court disagrees with Defendant's multiplicitous argument on *Enmund/Tison* findings. *Enmund/Tison* findings are not aggravators. *State v. Garcia*, 224 Ariz. 1, 20, 226 P.3d 370, 389 (2010). Defendant cites no authority that these findings are subject to the Double Jeopardy Clause.

The Eighth Amendment requires that a capital sentencing scheme genuinely narrow the class of persons eligible for the death penalty. *Zant v. Stephens*, 464 U.S. 862, 877 (1983). The narrowing function can occur in the definition of the crime or in the definition of an aggravating circumstance. *See Lowenfield v. Phelps*, 484 U.S. 231, 241-46 (1988)(upholding Louisiana's capital sentencing scheme where only first-degree murderers were death eligible, and four of five types of first-degree murder led automatically to a death qualifying aggravator that was identical to an element of the crime).

Arizona's capital scheme narrows the class of death eligible murderers first at the guilt phase, by making only those guilty of first-degree murder potentially death eligible. *State v. West*, 176 Ariz. 432, 449, 862 P.2d 192 (1993)("Federal cases hold that Arizona's capital sentencing scheme, as construed by this court, does narrow the class of death eligible defendants sufficiently to comply with the Eighth Amendment"), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998). Further, only certain first degree murderers are death eligible - those who commit a first degree murder with one or more aggravating circumstances present. *Id*. However, the fact that an element of first-degree murder is also an aggravating factor does not render Arizona's scheme insufficiently narrow. *See, State v. Cruz*, 218 Ariz. 149, ¶¶128-132, 181 P.3d 196 (2008)(killing a person one knows to be a peace officer who is acting in the line of duty adequately narrows the class of persons subject to the death

penalty even though A.R.S. §13-1105(A)(3) and A.R.S. §13-751(F)(10) require proof of nearly identical facts); *West*, 176 Ariz. at 449(the fact that all first-degree murders committed for pecuniary gain are death eligible does not render the Arizona scheme unconstitutional).

Likewise, the fact that a defendant who murders a person during the course of a felony becomes death eligible based on the (F)(2) aggravator of the contemporaneous convictions of the predicate felonies does not result in insufficient narrowing. The offense of felony murder does not require that the defendant have been charged with and convicted of the underlying predicate felony. *Id.*, 187 Ariz. at 350, 929 P.2d at 1298. The Court believes that based upon its capital jurisprudence and analysis of *Lowenfield*, the Arizona Supreme Court would adhere to its holding that Arizona's capital sentencing scheme sufficiently narrows the class of death eligible defendants.

On the grounds of multiplicity the Defendant also requests that the alleged pecuniary gain aggravating circumstance of (F)(5) be stricken. However, the Court finds *State v. Anderson*, 210 Ariz. 327 (2005) controlling. A finding of (F)(5) is not duplicative since the elements of felony murder and robbery are different, citing *State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991, 1010 (1984) ("While armed robbery requires proof of a "taking of property from the victim," the pecuniary gain aggravator requires proof that the defendant's "motivation [for the murder] was the expectation of pecuniary gain").

For all of these reasons,

IT IS ORDERED denying the motion.

Re: Defendant's Motion to Sever Count 5 of the Indictment:

The State has charged Defendant with misconduct involving weapons (Count 5), requiring evidence in the guilt phase to prove that Defendant is a "prohibited possessor" having been previously convicted of a felony.

Possession of the gun is linked to the other crimes and therefore is properly joined per Rule 13.3. *See State v. Johnson*, 212 Ariz. 425, ¶¶7-12, 133 P.3d 735 (2006)(joinder of first-degree murder, robbery and burglary charges with assisting criminal syndicate charge was proper under Rule 13.3(a)(2) because motivation behind robbery and murder was to further the criminal objectives of gang); *State v. Prion*, 203 Ariz. 157, ¶32, 52 P.3d 189 (2002)(defining "otherwise connected together in their commission" as situation in which evidence of the two crimes is so intertwined and related that much the same evidence is relevant to and would prove both, and the crimes themselves arose out of a series of connected acts); *State v. Befford***,** 157 Ariz. 37, 754 P.2d 1141 (1988)(noting consolidation proper where evidence relating to one set of charges

would be admissible on another set "as part of the complete picture," citing *State v. Via*, 146 Ariz. 108, 115, 704 P.2d 238, 245 (1985), *cert. denied*, 475 U.S. 1048 (1986)).

The State is entitled to prove Defendant is a prohibited possessor and its intention to prove this fact with a sanitized version of the conviction will not be unfairly prejudicial.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.